**BSN MERCHANT BANK BHD**

**v.**

**YAP PING KON & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN JC
[CIVIL SUIT NO: D5-22-520-1995]
10 JANUARY 1997

***CIVIL PROCEDURE:*** *Summary judgment - Triable issues - Admission of liability by third party - Rules of the High Court 1980, O. 14*

The plaintiff claimed the sum of RM3m with interest and other related charges against the defendant under a facility agreement ('the loan') between the defendant and the plaintiff's predecessor-in-title, Rakyat Merchant Bankers Bhd ('RMB'). By a vesting order dated 22 July 1995, all the assets of RMB became vested in the plaintiff. The plaintiff applied for summary judgment under O. 14 of the Rules of the High Court 1980 ('the RHC'), relying on a certificate of indebtedness as conclusive evidence of the defendant's indebtedness. The application was refused by the senior assistant registrar and the plaintiff appealed. In the appeal, the defendant sought to show that a triable issue existed as he had, on 14 December 1995, obtained an order to bring in one Tan Sri Lim Geok Chan ('LGC') as a third party to the action and that LGC had, *via* a letter dated 30 March 1995, informed RMB that the loan had been taken by the defendant as LGC's nominee and that LGC undertook to settle the loan and indemnify the defendant in respect of it. RMB acknowledged receipt of the letter. There was also evidence to show that the defendant had written to RMB several times regarding the admission and settlement by LGC but had received no reply.

**Held:**

**[1]** The failure of RMB to reply to the defendant's letters and the clear and unequivocal admission by LGC that the loan was taken for his benefit lent credence to the defendant's averment of fraud and conspiracy. It would thus be a travesty of justice if the plaintiff were allowed to enter summary judgment.

**[2]** It was also obvious that the loan was given without any security and in clear breach of s. 60(1) of the Banking and Financial Institutions Act 1989.

*[Application dismissed.]*

**Cases referred to:**
*Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627 SC* ***(foll)***
*MBf Finance Bhd v. Hasmat Properties Sdn Bhd & Ors [1990] 1 CLJ 107* ***(cit)***

**Legislation referred to:**
Banking and Financial Institutions Act 1989, s. 60(1)
Rules of the High Court 1980, O. 14

*For the plaintiff - N Nadkarni; M/s Lee Hishammuddin*
*For the respondent - John Clark; M/s Sidek Teoh Wong & Dennis*

*Reported by Anne Khoo*

## JUDGMENT

**RK Nathan JC:**

This is an appeal (encl. 29) by the plaintiff against the decision of the learned Senior Assistant Registrar (SAR) given on 17 May 1996 refusing the plaintiff's application for summary judgment.

The plaintiff's claim against the defendant is for the sum of RM3,000,000 together with accrued interest and other related charges (the debt) due and owing from the defendant to the plaintiff made under a written facility agreement dated 13 September 1993 entered into between the Rakyat Merchant Bankers Berhad (RMB) and the defendant. The loan was for a maximum period of six months from the date of first drawdown. By a vesting order dated 22 July 1995 all the assets of RMB became vested in the plaintiff.

Upon the defendant defaulting in the repayment of the said debt the plaintiff through its solicitors sent a demand notice dated 24 July 1995. Relying on the certificate of indebtedness annexed as exhibit BSN2 to the affidavit in support of the O. 14 application the plaintiff argued that the said certificate was conclusive evidence of the defendant's indebtedness. On this and based on *MBf Finance Bhd v. Hasmat Properties Sdn Bhd & Ors* [1990] 1 MLJ 180, 182 which gave effect to the conclusive evidence clause, the plaintiff prayed for judgment and for the appeal to be allowed.

In reply the defence relied on *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 MLJ 400 SC where the then Supreme Court held that in an O. 14 application a complete defence need not be shown. All that has to be done is to show that a triable issue exists.

In respect of raising triable issues the defendant submitted that he had already on 14 December 1995 obtained an order to bring in one Tan Sri Lim Geok Chan (LGC) as a third party to this action. In his affidavit, encl. 6, the

defendant had exhibited a letter dated 20 January 1994 from LGC to RMB to set off the loan registered under the defendant with RMB, as against the credit balance of RM3,547,515.47, which LGC had with RMB. There was no response to this from RMB. The defendant wrote to RMB on 28 March 1994 stating that he would not extend the period of the loan as it had been settled on LGC's instructions. There was no reply to this letter. On 18 April 1994 the defendant again wrote to RMB that since the period of the loan had expired on 17 February 1994 he did not owe the bank any more because of the letter relating to the set off dated 20 January 1994 from LGC. Again there was no reply from RMB. The defendant wrote again to RMB on 25 April 1994 questioning the right of rollover. There was no reply to this. RMB then sent a demand notice dated 28 June 1994 and the defendant replied through his solicitors dated 20 July 1994 and referring to the letter of set off from LGC. There was no reply to this. Then on 20 September 1994 RMB's solicitors sent a letter of demand which the defendant replied through his solicitors and again referring to the letter of set off from LGC. The defendant said that he had received a receipt no. 17444 for RM330,402.72 from RMB, being payment of interest, which sum he denies paying. He demanded to know from RMB as to who settled the said sum but again he was met with stone-wall silence. Finally, he said LGC had signed a letter dated 23 December 1994 in which he admitted that the said loan of RM3,000,000 was taken in the defendant's name at LGC's request and that the defendant was only a nominee and that the loan was fully utilised by LGC. He also undertook to settle the loan with RMB and to indemnify the defendant against all claims made by RMB. The said LGC then wrote to RMB on 30 March 1995 as follows:

> 30 March 1995
>
> Raykat Merchant Bankers Berhad
> 15th Floor Wisma Genting
> Jalan Sultan Ismail
> PO Box 12346
> 50774 Kuala Lumpur
>
> Attn: Encik Mohd Zin/Encik Sofian
>
> Dear Sirs
>
> **RE: LOANS RELATING TO TAN SRI LIM GEOK CHAN**
>
> With reference to the above matter and your letter dated February 16 1995, I write to confirm the followings:

**WHEREAS:**

(i) YAP PING KON, LIM SING JOO and LIM CHEE KIANG are currently enjoying overdraft facilities from Rakyat Merchant Bankers Berhad ("the Bank") under the Reference no. 018327, 018432 and 018326 respectively (hereinafter collectively called the "Accounts").

(ii) that the abovenamed persons were acting as my nominees and or agents in respect of the loan granted by you to them.

(iii) I, LIM GEOK CHAN, have requested the bank to release and discharge YAP PING KON, LIM SING JOO and LIM CHEE KIANG from their liabilities incurred in respect of the Accounts upon me assuming their respective liabilities under the Accounts.

In consideration of the Bank releasing and discharging YAP PING KON, LIM SING JOO and LIM CHEE KIANG from all claims and demands whatever in respect of the Accounts and transactions in respect thereof and accepting my liability in their place, I hereby AGREE to accept the liabilities of YAP PING KON, LIM SING JOO and LIM CHEE KIANG in respect of the Accounts and duly undertake to discharge such liabilities.

In furtherance of the above, I hereby undertake to pay the sum of Ringgit Malaysia Nine Million (RM9,000,000.00) only thereon towards the discharge of the entire liabilities owing under the Accounts within three (3) years from the date of 1st May 1995, and I undertake to make such payment comprising repayment towards the abovementioned amount due on the aforesaid liabilities in six (6) *equal instalments every six (6) months.

Yours faithfully

Sgd.
TAN SRI LIM GEOK CHAN

RMB has acknowledged receipt of this letter. In the light of all these evidence, I cannot ignore the contents of the defence and the averments in the defendant's affidavits.

Besides it is obvious that the said loan was given without any security and in clear breach of s. 60(1) of the Banking and Financial Institutions Act 1989 (Bafia).

The failure of RMB to reply to the numerous letters sent by the defendant, the clear and unequivocal admission by LGC that the loan was taken for his benefit lends credence to the defendant's averment of fraud and conspiracy. It will be a travesty of justice if the plaintiff is allowed to enter summary judgment in this case.

Considering all the issues raised by the defence, I had no hesitation in dismissing this appeal with costs.